

Harpswell Board of Appeals  
Minutes of January 27, 2010

Adopted

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**[Please Note: This meeting was not recorded digitally due to recording equipment malfunction.]**

**Attendance:** Ned Simmons, Chair, John Perry, Jim Knight and Ellen Lebauer. In addition, Code Enforcement Officer William Wells and Recording Secretary Melissa Moretti were also in attendance.

**Absent:** George Every

The meeting had been duly advertised in the Brunswick *Times Record*. Ned Simmons, Chair, called the meeting to order at 6:42 PM at the Harpswell Town Office, 263 Mountain Road, Harpswell. The Chair reviewed the Agenda, introductions were made of Board members and procedures were explained.

**Old Business**

There was no old business to discuss.

**New Business**

**1. Matter of Sarah & John Moulton, Undue Hardship Variance Request, Map 14 Lot 78, 1437 Menikoe Haven Road, Harpswell.**

**Participating in Hearing** – The Board members present and the Code Enforcement Officer, Mr. Wells

The Chair reviewed the packet materials, and addressed the matter of the site visit which was held at the Moulton property at 8:00 AM on Monday, January 25, 2010. The only member of the Board who attended was Mr. Perry, who described the property. He said it had a general slope down to the water, and was wooded.

Sarah Moulton addressed the Board, and stated she owned the property jointly with her sister. She introduced her husband, John, and also the designer of the project, Tom Peterson. Mr. Moulton explained that they wanted to build an energy efficient “green” house, and that it would be more than the 250 ft. setback from the shoreland zone [required by the ordinance].

The Chair said that the Moultons were “obliged” to meet Town standards, and referenced No. 5(1) of the Board of Appeals Application (the “Application”). Mr. Moulton explained that they had exceeded the height requirement. The Chair stated that he had been on a committee to draft the Town’s ordinances and explained why the height restriction was important.

Tom Peterson, owner of Solar Design & Construction, addressed the Board and gave a detailed description of the project. He described the building as an octagon which was “the most practical and economical shape” for the house. He explained that it had been designed around passive solar heating as well as cooling. The design was two-story, and was high because of the adequate pitch of the roof. He said the first floor had a nine foot ceiling, and the second floor had an eight foot ceiling; the roof was a 6/12 pitch. He also said the third floor would be attic space, with “no living space” or windows.

Mr. Perry asked if they could remove the center area and extend the roof. There was a discussion regarding the cupola and the height restriction. It was decided that the cupola would be too small. There was discussion. The Chair suggested that the 6000 sq. ft. structure could be scaled down.

Mr. Peterson suggested they might be able to take the neighboring lot (also owned by the Moulton’s) that was in the shoreland zone and qualify under a different variance. Mr. Moulton asked what would constitute a “reasonable return” (as referenced in No. 5(1) of the Application); the Chair explained. Mr. Perry gave anecdotal history regarding a Bailey Island property where he thought a variance had been granted in the past. There was discussion among the Board members.

Mr. Knight said they could have reasonable return and just not have the desired design. He also said that a practical difficulty variance would be easier for the Board to consider, but still “wouldn’t fit.” Mr. Perry read from Pg. 28 of the Basic Land Use Ordinance (“BLUO”), §14.1.4.5 “Practical Difficulty Variance,” and also from Pg. 10 of the BLUO, §11.3.2 “Height of Structures” to address the height of the cupola. The Chair read §14.1 “Variances” of the BLUO. There was discussion among the Board members regarding dimensional standards.

With regard to the subject of cupolas, Mr. Perry stated the opinion that the ordinances were written incorrectly. Mr. Knight explained to the Moultons that the purpose of the Board was “to attempt to find a way to grant within the framework of the ordinances.” He stated that “he did not have a “convincing argument to approve.” There was discussion among the Board members.

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Ms. Lebauer reminded the Board that neither size nor shape were the issue. Other scenarios were discussed by the Board members, i.e. driving the structure further into the ground, etc. The Chair asked for any other comments.

Mr. Wells addressed the Board, explained the height measurements of the proposed design, and said the Moultons actually needed a 6 ft. variance, not the 10/11 ft. variance stated in their application. He also mentioned the only instance where he could find evidence that the Board of Appeals had granted a variance from height standards was in 1999. That variance had been for a 39 ft. high structure in the shoreland zone (Reed Coles had signed it).

Jane Meisenbach, a neighbor, addressed the Board and asked where the 16 sq. ft. of the cupola came from. Mr. Wells and Mr. Perry both said it was "arbitrary." Mr. Wells explained what was allowed.

Mr. Peterson asked the Board how a redesign might be accomplished. The Chair said the cupola could be incorporated if it were smaller and the rest of the structure met the 30 foot height standard. He clarified that there would be no guarantee they could get a practical difficulty variance. He stated that variances were "not granted very often."

Mr. Perry said that the Board of Appeals had obtained "legal advice" with regard to No. 5(1) of the Application in the past; Mr. Knight said that would "go against" the Moultons. There was further discussion.

The Chair asked if there were any other comments; there were none. He then addressed Sec. B "Conclusions of Law" of the "Notice of Decision Variance" form. The Board voted on the issues listed under No. 1 "Undue Hardship Dimensional Variance." Results were: (a) the Board agreed unanimously that the property could yield a reasonable return without the variance being granted; (b) the Board agreed unanimously that the property was typical of the neighborhood; and (c) the Board agreed unanimously that a granting of the variance would not alter the essential character of the locality. Mr. Perry seconded the motion the Chair made with regard to (d), then the Board discussed the interpretation of "hardship." The Chair and Mr. Perry voted to agree that the hardship was not the result of action taken by the applicant or prior owner; Mr. Knight and Ms. Lebauer voted to disagree with that statement.

The Chair stated that the result of the vote of the Board was that the Undue Hardship Variance was denied; he explained the rights of appeal to the Moultons.

Rick Meisenbach [from the audience] suggested that the ordinance could be changed. The procedure for changing an ordinance was explained by the Board; there was general discussion while the Chair completed the Notice of Decision form.

The Chair read the Notice of Decision form to the Board and made a motion to deny the variance, Mr. Knight seconded. The vote to deny carried four to none. The Board members signed the Notice of Decision.

#### **Other Business**

##### **Consideration of Minutes: Meeting of July 29, 2009**

The Board voted unanimously to adopt the Minutes of the July 29, 2009 meeting as printed.

##### **Consideration of Minutes: Meeting of October 28, 2009**

The Board voted three to none to adopt the Minutes of October 28, 2009 as printed; Mr. Simmons abstained.

Mr. Wells addressed the Board with two hypothetical issues he wanted the Board's opinion on, and distributed a handout.

1. In 1990, there had been a building permit issued for a property on Birch Island that had been built too close to the property line. He said that there had been a "Special Exception Appeal" in 1990 and asked if the Board could act now with something like what was in the 1990 ordinance. The Chair's opinion was "no." Ms. Lebauer asked why it [the "Special Exception Appeal"] had been removed from the ordinance (was it a State law)? The consensus of the Board was that Mr. Wells should get an opinion from the Town Attorney.

2. Mr. Wells distributed a handout and presented the issue of the Orr's Island Library. He stated that the new addition did not meet the variance requirement (which had been considered by the Board on February 25, 2009 and granted). Mr. Wells referenced language from the Code Enforcement Officer Training Manual (from the Maine State Planning Office) that stated the Code Enforcement Officer could issue an "exception letter" ["Letter of No Action"]. He clarified that the Library had asked for a "reduction to the reduction," and they had "gone over by 3 ft. 7 3/16 in."

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The Chair said the Board could not rule without an application, and that the Library could also go before the Board of Selectmen for a consent agreement.

The Chair addressed the matter of the wording of the ordinance regarding the Practical Difficulty Variance and also the Hardship Variance sections. There was discussion among the Board members.

**The Chair adjourned the meeting at 8:40 PM.**

**Respectfully submitted,**

**Melissa Moretti**  
**Recording Secretary**